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LETTER

OF

THOMAS LEE, Not. Pub.

TO

THE EARL DALHOUSIE,

GOVERNOR IN CHIEF OF LOWER-CANADA, &c. &c. &c.

RELATING TO HIS LATE

DISMISSION FROM THE MILITIA OF THE PROVINCE.

"Quand les nations murissent, la pensée est un instrument nouveau pour elles; il faut leur apprendre à s'en servir; aucune puissance humaine ne seroit assez forte pour leur enlever."—*Dupin: Droit de la nature et des gens.*

QUEBEC:

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1827.

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INTRODUCTION.

THE different reasons which I have recently heard given on the Letter, which I had the honour to address to His Excellency the Earl of Dalhousie, Governor-in-Chief, in respect of the annulling of my Commission, as Captain in the 1st battallion of the militia of Quebec, induces me to get it republished, annexing the following opinions and decisions, so as to give my fellow-citizens the means of judging of the rights which a British subject ought to enjoy in this Province. I do it also with a view, that, after having examined attentively these opinions and decisions, drawn from English jurisprudence and constitutional law, they may not impute to my expressions any other mea..ing than that which honor and duty imperiously exacted from me in a similar case.

Quebec, 2d. Dec. THOMAS LEE, N. P.

POSTSCRIPTUM.

It is proper to observe that I was absent from militia duty with the permission of Lieut.-Col. Perrault, as I resided in the country; that I did not attend any of the musters of the militia on any occasion during the last summer. Although, in consequence of my absence from Militia duty, I preferred no complaint against the militiamen of my company who did not attend on the parade-ground, yet Lieut.-Colonel Perrault had the indelicacy to use my name as a common informer, and instituted proceedings against these individuals. I may remark also that I

transmitted a letter to the Adjutant-General on the 11th October last, asking for a court of enquiry on my refusal to follow the instructions I had received, and to obey the orders of Lieut.-Col. Perrault, in regard to the actions he had determined to institute against the militiamen of my company.

LETTER OF THOMAS LEE, &c.

(Extracted from the paper published at Quebec by authority of the Earl of Dalhousie, Governor-in-Chief.)

" Office of the Adjt.-Gen. of Militia,
" *Quebec, 25th Oct.* 1827.

" General Order of Militia.

" Lieut.-Col. Perrault, having laid before His Excellency, the Governor in-Chief, a Letter addressed to him by Capt. Thomas Lee, in the following words:—

(*a*) ' Apres avoir considéré la manière peu généreuse que vous employez pour poursuivre les Miliciens de ma Compagnie, qui sont supposés avoir manqués aux exercises présents, par la 27e. et la 29e. année de George Trois; je crois devoir vous informer que je me suis refusé et que je me refuse à me conformer à vos instructions, et à exécuter vos ordres à cet égard.

' J'ai l'honneur d'être Monsieur votre obeissent serviteur,
(Signé) THOMAS LEE,
' Cap. 1r. Bat. M. C. Q.
' Quebec, 2e. Oct. 1827.'

' Au Lieut. Col. Perrault,
1e. Bat. M C. Q.

" His Excellency considers this to be a breach of discipline so gross, that it merits immediate punishment and disgrace (*b*); the Governor-in-Chief therefore, in the exercise of the authority vested in him, cancels the Commission of Mr. Thomas Lee, (*c*) and orders that he be enrolled as a private militiaman, wherever he may reside in the province of Lower-Canada.

(*a*) See a correct copy of the original Letter appended.

(*b*) Punishment: a penalty for transgressing the Law.

Punition: Ce mot est synonyme à chatiment. La punition est reservée à la seule autorité des lois.

Disgrace, *s.* State of ignominy, dishonour, state of shame.—*Johnson's Dic.*

(*c*) By the XIV th clause of the ordinance of the 27 Geo. III. without admitting that it is in force, Notaries are exempted from serving in the Militia.

" His Excellency having also received a report from Lieut.-Col. Perrault, commanding the 1st Battalion of Militia of the County of Quebec, containing a complaint against Lieut.-Col. Laforce of that Battalion, arising from his conduct as President of a Court Martial lately assembled for the trial of Militiamen of that Battalion who had neglected their duty, and having received further explanation from these officers on the subject, His Excellency feels it his duty to declare his approbation of the course adopted by Lieut.-Col. Perrault, but as His Excellency is led to believe from the explanation given by Lieut.-Col. Laforce, that the differences between him and his commanding officer may have arisen from misunderstanding on his part, His Excellency therefore considers it unnecessary to pursue the matter further.

" By order of His Excellency the Commander-in-Chief,

" F. VASSAL DE MONVIEL,

" Adjt.-Gen. M. F."

(EXTRACTED FROM THE QUEBEC GAZETTE, OF THE 29th OCTOBER, 1827.)

To His Excellency the Earl of Dalhousie, Governor-in-Chief of the Province of Lower Canada, &c. &c.

My Lord,

Since you have taken the papers, and used the prerogative to destroy me in the good opinion of my fellow-citizens, without allowing me the right I had, and the common opportunity of being first heard, I take the liberty of using very respectfully the same channel to defend myself.

I protest therefore against the militia general order of the 25th October inst., which annuls my commission of Captain in the 1st battalion of the militia of Quebec, under the command of Lieut.-Col. Joseph Perrault, because I honestly and lawfully refused obedience to the illegal orders of the said Jo-

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seph Francois Perrault;* because your militia general order, my Lord, as Governor-in-Chief is illegal; because the idea artfully spread in society, that a Governor, by virtue of his commission, is accountable for his conduct only to God and his conscience; or that he can, with impunity, act in any instance arbitrarily, despotically, or tyrannically as regards the liberties or property of his Majesty's brave and loyal Canadian subjects, is a monstrous doctrine, which cannot be maintained without the greatest danger; because a Governor cannot, under the colour of law, nor even under the most rigid forms of law, exercise cruelty, malice, or oppression in respect of any of his Majesty's subjects without being therefore personally responsible; because you have unjustly listened, my Lord, to wicked insinuations injurious to me, and false: finally, because the letter which you have caused to be published, and annexed to the general order of militia which annuls my commission, is, my Lord, incorrect, and contains absurdities and falsehoods.

THOMAS LEE,

Ex-Capt. of the 1st bat. of the Militia of Quebec, and Notary.

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*The following anecdote may be relied upon, as true; it is said to be written by Sir Walter Scott:—

"At the table of the Commander in-Chief, not many years since, a young officer entered into a dispute with Lieutenant-Colonel ————, upon the point to which military obedience ought to be carried. 'If the Commander-in-Chief,' said the young officer, like a second Seid, 'should command me to do a thing which I knew to be civilly illegal, I should not scruple to obey him, and consider myself as relieved from all responsibility by the commands of my military superior.' 'So would not I,' retorted the gallant and intelligent officer, who maintained the opposite side of the question; 'I should rather prefer the risk of being shot for disobedience by my commanding officer, than hanged for transgressing the laws and violating the liberties of the country.' 'You have answered like yourself,' said his Royal Highness, whose attention had been attracted by the vivacity of the debate; 'and the officer would deserve both to be shot and hanged that should act otherwise. I trust all British officers would be as unwilling to execute an illegal command, as, I trust, the Commander-in-Chief would be incapable of issuing one."

APPENDIX.

THE following Extracts, from Williams' Cases argued and determined in the English Courts of Law, are found in the 1st edition of that Work :—

MISFEASANCE IN THE EXERCISE OF A PUBLIC AUTHORITY

Mostyn v. *Fabrigas, Mic.* 15 *Geo. III. B.R. Cowp.* 161.

An action may be maintained against the Governor of any British Settlement on his return to England, for an injury done by him under *the colour of his authority:* for where an action was brought in the Court of Common Pleas, by the plaintiff against the defendant, for an assault and false imprisonment, and banishing him from the Island of Minorca, to Carthagena in Spain: the defendant put in two pleas, 1st, Not Guilty; 2dly, That he was governor of Minorca by letters patent from the Crown. That the plaintiff was raising a sedition and mutiny; and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island, which as governor, being invested with all the privileges and rights of a governor, he alleged he had a right to do. The replication was, *de injuriâ sua propriâ absque tali causa;* by which he denied the truth of the fact, and put in issue whether the facts in the plea were true. At the trial, the jury gave a verdict for the plaintiff upon both issues, with 3,000*l.* damages and 90*l.* costs: it appearing by the evidence, that the defendant being such governor as aforesaid, caused the plaintiff to be seized, imprisoned, and banished, without any reasonable or probable cause, or any other matter alleged in his plea, or any other act tending thereto. The defendant tendered a bill of exceptions; upon which bill of exceptions the cause came before the Court of King's Bench: and it was there contended, that the plea of not guilty was totally immaterial, and so was the plea of justification; because from the plaintiff's own shewing, it appeared, 1st, That the cause of action arose in Minorca, out of the realm. 2dly, That the defendant was governor of

Minorca; and by virtue of such his authority, imprisoned the plaintiff: *and from thence it was argued, that the judge who tried the cause, ought to have refused any evidence whatsoever, and have directed the jury to find for the defendant.* The reasons assigned for which were, 1st, That the defendant, as governor of Minorca, *being absolute*, and vested with both the civil and criminal jurisdiction as the *supreme power*, was therefore not answerable for any injury done by him in that capacity. 2dly That the injury being done at Minorca, *out* of the realm, was not cognizable by the king's courts in England. But by Lord Mansfield, on to the first point, as to the sacredness of the defendant's person as governor, if it were true, that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification, because, *prima facie*, the court has jurisdiction. If the court has not a general judisdiction of the subject matter, the defendant must plead to the jurisdiction and and cannot take advantage of it upon the general issue. And in every plea to the jurisdiction, you must state another jurisdiction: to repel the jurisdiction of the king's court, you must show a more proper and more sufficient jurisdiction: for if there is no other mode of trial, that alone will give the king's Courts jurisdiction. Now in this case, no other jurisdiction is shewn; and if the king's courts of justice cannot hold plea, in such case, no other court can do it; for a governor is in the nature of a viceroy; and therefore, *locally*, during his government, no civil or criminal action will lie against him; because, upon process, he would be subject to imprisonment; and when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached. Another very strong reason would alone be decisive, and it is this: that though the charge brought against him is for a *civil* injury, yet it is likewise of a *criminal* nature; because it is in *abuse* of the authority delegated to him by the king's letters patent under the great seal. Now, if every thing committed within a dominion is tryable by the courts within that dominion, yet the effect or extent of the king's letters patent which give the authority, can only be tried in the king's courts, for no question concerning the seignory can be tried within the seignory itself. So that, *emphatically*, the governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent, legally and properly, or whether he has abused it, in violation of the laws of England, and the trust so reposed in him It does not follow from hence, that let the cause of action arise where it may, a man is not intitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right, according to the authority with which he is invested, he must lay it before the court by way of plea, and the

court will exercise its judgment whether it is a sufficient justification or not. *In this case, if the justification had been proved,* the court might have considered it as a sufficient answer; and if the nature of the case would have allowed it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. *There may be cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace;* as for instance, if, during a seige, or upon an invasion, the governor should judge it proper to send an hundred of the inhabitants out of the island from motives of real and general expediency; or if, upon a general suspicion, he should take people up as spies: upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case.—As to suggestions with regard to the difficulty of bringing witnesses, the court will always *take* care that a defendant is not surprised, and that the man has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court.

There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the king's commission. (*d.*) If he wants the testimony of witnesses, whom he cannot compel to attend, the court will oblige the party to consent that the witnesses may be examined upon interrogatories; and that the depositions therein taken shall be read at the trial. And unless the party will so consent, the court will put off the trial for ever.—*In every light, therefore, in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person.* If so, he is accountable in this court, or he is accountable nowhere, for *the king in council has no jurisdiction.* Complaints made to the king in council tend to remove the governor, or take from him any commission which he holds during the pleasure of the crown. But if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish

(*d*) With respect to charges relating to arbitrary acts done by a former Governor of the Province (meaning Sir James Henry Craig) which the Assembly imputed to the advice given by the Chief Justice to that Governor, by referring to Sir Gordon Drummond's message to the House of Assembly, 1816, I find the following opinion :—"His Royal Highness has deemed that no inquiry would be necessary as to that point, inasmuch as none could be instituted without the admission of the principle, that the governor of a province might at his own discretion divest himself of all responsibility on points of political government."

him in any shape for the injury committed. *Therefore to lay down in an English court of justice, such a monstrous proposition, as that a governor, acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained* (e). As to the other objection, namely, that as the cause of action arose abroad, it could not be tried here in England, his lordship, after a very learned and elaborate discrimination between *transitory* and *local* actions, declared that there was not a question which could arise upon the subject, and the judgment was affirmed *per tot cur.*

Sutherland v. Murray, sitt. at Westm. aft. Ea. 1783. *Cor. Eyre Baron cited,* 1 *Ter. Rep.* 538.

So, where the declaration stated that the defendant was governor of Minorca, and vice-admiral of the island; that the plaintiff was judge of the vice-admiralty court, with all fees, emoluments, &c., and that the defendant to injure and oppress him, *maliciously, and without any reasonable or probable cause suspended him from his office, per quod,* he lost his profits. On the evidence it appeared, that General Murray had legal authority to suspend till the king's pleasure was known; that he had so suspended him, and directed the Secretary of State to take the king's pleasure on it. The general professed himself ready to restore him if he made a particular apology, the king approved of the suspension, unless the terms were complied with. There the plaintiff recovered 5,000*l.* *The gist of the action was,* admitting the legality of the suspension thus confirmed, *that the defendant exercised*

(e) Paley says, "The constitutional maxim, 'that the king can do no wrong,' is balanced by another maxim not less constitutional, 'that the illegal commands of the king do not justify those who assist, or concur, in carrying them into execution;' and by a second rule, subsidiary to this, 'that the acts of the crown acquire not a legal force, until authenticated by the subscription of some of its great officers.' The wisdom of this contrivance is worthy of observation. As the king could not be punished without a civil war, the constitution exempts his person from trial or account; but, lest this impunity should encourage a licentious exercise of dominion, various obstacles are opposed to the private will of the sovereign, when directed to illegal objects. The pleasure of the crown must be announced with certain solemnities, and attested by certain officers of state. In some cases, the royal order must be signified by a secretary of state; in others, it must pass under the privy seal; and, in many, under the great seal. And when the king's command is regularly published, no mischief can be achieved by it, without the ministry and compliance of those to whom it is directed. Now all who either concur in an illegal order, by authenticating its publication with their seal or subscription, or who in any manner assist in carrying it into execution, subject themselves to prosecution and punishment, for the part they have taken; and *are not permitted to plead or produce the command of the king in justification of their obedience.* But further: the power of the crown to direct the military force of the kingdom, is balanced by the annual necessity of resorting to parliament for the maintenance and government of that force."

his original authority maliciously, and without any reasonable or probable cause (f), and by his malicious and false representation procured the suspension to be confirmed.

Wall v. Macnamara, sitt. Westm. af. M. 1779, *cited* 1 *Ter. Rep.* 536.

And a person representing the king in all functions, *civil and military*, shall answer for an abuse of his authority, *though the act complained of was in itself legal*, if it appears to have been aggravated by unnecessary cruelty, malice, and oppression: for where an action was brought by the plaintiff, as captain in the African corps, against the defendant, as lieutenant-governor of Senegambia, for imprisoning him for nine months at Gambia in Africa, the defendant pleaded the general issue, intending to justify the imprisonment under the mutiny act for disobedience of orders. At the trial, it appeared that the imprisonment, which at first was legal, namely, for leaving his post, without leave from his superior officer, though in a bad state of health, was aggravated by many circumstances of cruelty. Lord Mansfield, in summing up to the jury, said, "in trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur, without the possibility of application for proper advice, great latitudes ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as where complaints are brought against inferior civil magistrates, such as justices of the peace, for actions done by them in the exercise of their civil duty. There the principal inquiry to be made by the court of justice is, *how the heart stood?* and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, *if cruelty, malice, and oppression, appear to have occasioned or aggravated the imprisonment, or other injury (g) complained of, they shall not cover themselves with the thin vest of legal forms, nor escape under the cover of a justification the most technically regular*, from that punishment, which it is your province and your duty to inflict on so scandalous an abuse of public trust. In the present case, it is admitted, that the plaintiff

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(f) Since the ordinance in question, in the opinion of his Excellency, was in force, why was not the XIIth clause consulted, which statutes the manner of trying both militiamen and officers for contraventions. Instead of that, his Excellency has chosen, for reasons best known to himself, to use the king's prerogative.

Montesquieu parlant des Rois, dit, "Le droit de faire grace aux coupables est le plus bel attribut de la souveraineté d'un monarque; il ne doit donc pas être leur juge." The power of dispensing with laws, or the execution of laws by regal authority is illegal.—*Bill of Rights.*

(g) See how my character is aspersed by the language of the general order of militia, printed in the first part of this Letter.

was to blame in leaving his post ; but there was no enemy—no mutiny—no danger—his health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted ; but supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for *denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, where there was no possibility of bringing him to a trial for several months*, there not being a sufficient number of officers to form a Court Martial. These circumstances, independent of the direct evidence of malice, as sworn by one of the witnesses, are sufficient for you to perceive a malignant motive in the defendant, which would destroy his justification, had it even been within the power delegated to the defendant by his commission.—The jury gave 1000*l.* damages."

I shall finally add a passage from Brougham's "Inquiry on the Political Policy of the European Powers :—

After an *exposé* of the causes which gradually brought about the independence of the old Colonies, now the United States of America, by the narrow-minded policy of the then Ministry : "May we presume to hope," says that enlightened Gentleman, vol. i. p. 138, whose liberality and noble principles are so well known all over the world, "that the colonial history of Great Britain will exhibit to future statesmen, a useful picture of the advantages which may fairly be expected from just views of provincial government ; that it will hold out the prospect of certain success to the enlightened and generous policy which shall consider the parts of an empire, however situated, as members of the same political body ; that it will display the possibility of retaining the distant provinces in the relations, not of subordination, but of union, even after they have become more worthy of bearing the same name, by their progress in wealth, in arts, and in arms ; and teach every nation of Europe, which is happy enough to possess such settlements, how amply their nurturing care must finally be recompensed, even in a political view, by the efforts of their maturer age. 'All colonies,' says an eloquent and sagacious historian, 'are a kind of political children, and, as such, contribute to the honour, safety, and riches of their parents, if those parents are not wanting to themselves. It is, however, very common for governments, as well as private persons, to fall into many great errors upon this head : such as, treating young colonies with vast tenderness and indulgence, forming from thence very sanguine, and sometimes very unreasonable expectations ; and, because these are not

answered as soon as expected, falling out with, and disregarding, those colonies, at the very time when, if they had been attended to, they might have more than answered their expectations. It is likewise common with them, as well as parents, to grow unreasonably, I was going to say ridiculously, jealous of their offspring; and, by this foolish conduct, actually producing those mischiefs they endeavoured to avoid, and which could have been produced only by such endeavours. They are apt to fancy, that, because the children are settled at a distance, they forget that they are children; and, full of this idle fancy, they soon forget that they are parents, and begin to treat them with an arbitrary authority. Because they live at a distance, and support themselves by their own labours, they make it their study to draw from them wherewith to maintain the luxury and prodigality of those children who live at home with them, and are thereby become the objects of an irregular affection, which very soon degenerates into an excessive indulgence. Hence arise all those mischiefs that are so warmly deplored by those, who, if they would act with proper care and spirit, might easily amend them: for it is with colonies, as it is with children; nine times in ten their errors spring from the usage they have met with: and they are blamed for their miscarriages, by those who are actually the authors of those miscarriages, *and ought therefore to blame themselves.*"*

Lettre du capitaine Lee au colonel Perrault. commandnt le 1er bataillon de milice du comté de Quebec.

MONSIEUR,

Après avoir considéré la manière peu généreuse que vous employez pour poursvivre les miliciens de ma compagnie, qui sont supposés avoir manqué aux exercices prescrits par les ordonnances de la 27e et de la 29e année de Geo. III., je crois devoir vous informer que je me suis refusé et que je me refuse à me conformer à vos instructions, et à exécuter vos ordres à cet égard.

J'ai l'honneur d'être,

Monsieur,

votre obéissant serviteur,

25 octobre 1827. THOMAS LEE, capt. 1er bat. M. C. Q.

Au lieut.-col. Perrault, 1er bat. M. C. Q.

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* History of Peru and Chili—Harris's Voyages, vol. 2, p. 165.